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CIV APPEALS 23 & 28/2008

IN THE COURT OF APPEAL OF SIERRA LEONE
BETWEEN:
MOHAMED GASSAMA - APPELLANT
AND
HANNAH SAMA - RESPONDENTS
FOUAD SHERIFF

COUNSEL:
V V THOMAS ESQ for Appellant
R JOHNSON ESQ for 1st and 2nd Respondents

CORAM:
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL
THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL
THE HONOURABLE MR JUSTICE S A ADEMOSU, JUSTICE OF APPEAL, (now deceased)

JUDGMENT DELIVERED THE 5th DAY OF JUNE,2013.

INTRODUCTION

1. These are Appeals brought by the Appellant by way of Notice of Appeal dated 6 May,2008, and by the 1st and 2nd Respondents by way Notice of Appeal dated 20 but filed on 22 May,2008, and Notice of Intention to contend that the decision of the Court below be varied, dated 3 but filed on 6 June,2008. The Appellant's Appeal is against that part of the Judgment of KAMANDA,JA, dated 10 March,2008, dismissing the Appellant's claim and awarding Costs against him, whilst failing to award Costs against the 1st and 2nd Respondents when dismissing their Counterclaim. At the hearing of the appeal, Mr Johnson, Counsel for the 1st and 2nd Respondents was requested by the Court to elect between arguing the appeal filed on 22 May,2008, or, arguing the Application to vary the Judgment of the Court below. He elected to pursue the Application for a variation of the Judgment of the Court below. The Court was satisfied that he had complied with Sub-Rule 18(1) of the Court of Appeal Rules,1985 and granted him Leave to withdraw the Notice of Appeal filed on 22 May,2008.

GROUNDS OF APPEAL

2. The Appellant's Grounds of Appeal are as follows:
   1. The Learned Trial Judge erred in Law and came to the wrong conclusion when he stated: "*I do not think it relevant in this case to evaluate the strength of the separate titles of the Plaintiff and the Defendants. Suffice it to say that both parties derive title from similar roots, a Statutory Declaration. I cannot therefore cast doubt on one title and accept the other*" in that:
      (a) There was clear evidence before the Court which proved conclusively that there was no connection between the 2nd Defendant's Conveyance (Exhibit D1) and the 3rd Defendant's Statutory Declaration upon which the said Conveyance was based. The 2nd Defendant failed to establish any documentary title to the property which he claims.
      (b) It was the Court's duty to determine whether the 2nd Defendant had any lawful right or title to his alleged property which enclosed a portion of the Plaintiff's land.
      (c) The Plaintiff established a better right to possession.
   2. The Learned Trial Judge having correctly identified as one of the main issues calling for adjudication the question, to wit: "*Is there an encroachment on Plaintiff's land by the Defendants?*", misdirected himself and came to the wrong conclusion when he held that the Plaintiff has failed to prove his claims sought in the action, in that:
      a) There was clear evidence before the Court including evidence from the 2nd Defendant's Surveyor to the effect that a portion of at least 10 feet of the Plaintiff's land shown on LS2383/86 attached to exhibit B1 had been enclosed in the 2nd Defendant's alleged plot of land shown on LS1985/90 attached to exhibit D1 and taken over by the 2nd Defendant.
      b) The 2nd Defendant's claim to the land shown on LS1985/90 attached to exhibit D1 was shown by uncontroverted evidence to be baseless.
      c) The Learned Trial Judge found that the 2nd Defendant failed to establish any possessory title to the land claimed by him and shown on LS1985/90 attached to exhibit D1.

d) The Learned Trial Judge totally ignored the significance of the evidence that the Plaintiff had cause to demolish the 2nd Defendant's 1st boundary fence which had been constructed inside the Plaintiff's land.

3. The Learned Trial Judge misdirected himself, by failing to evaluate the evidence led in support of the Plaintiff's case in relation to the evidence in support of the 2nd Defendant's claim to the property which 1st Defendant testified that 2nd Defendant bought from the 3rd Defendant, and came to the wrong conclusion when he stated: "*What I have failed to see is evidence from either of them that there is an encroachment by the Defendants on the plaintiff's land.*" Appellant will rely inter alia, on the reports of both surveyors to identify such evidence which the Learned Trial Judge failed to see, including 2nd Defendant's surveyor's report to the effect of differences in "*the measurements as found and as shown in the respective plans.*"
4. That the Learned Trial Judge erred in Law and came to the wrong conclusion as to costs in that he failed to exercise his discretion judicially and ensure that the costs of the Counterclaim action follow the event on the dismissal of the Counter claim, having applied that self-same rule on the dismissal of the Plaintiff's action.
5. The Learned Trial misdirected himself in that he totally ignored the fact that the 3rd Defendant who sold the 2nd Defendant's alleged land to him took no part in the proceedings although he knew of the action and the reliefs sought were also claimed against him.
6. That the Judgment is against the weight of the evidence.

3. The Appellant therefore asks that the Judgment of the lower Court be set aside, and that one be substituted in favour of the Appellant.

RESPONDENTS' CROSS-APPEAL

4. The 1st and 2nd Respondents were asking this Court to set aside the decision of KAMANDA,JA dismissing the 2nd Respondent's Counterclaim, and that a Judgment in favour of the 2nd Respondent be substituted in its place. Their complaint in the Notice of Appeal, which as we have stated above was withdrawn, were against those parts of the Judgment in which:
   a) The Learned Trial Judge held that the Plaintiff was within his rights to institute the action

b) The Learned Trial Judge found and held that the period spent on the land by the 1st Defendant was not authorized by the 2nd Defendant to qualify for adverse possession
c) The Learned Trial Judge held that the period of time in which the 2nd Defendant had been in possession of the land was from 4th April 2005 to the present.
d) The Learned Trial Judge overruled Counsel for the 1st and 2nd Defendants' submissions on the provisions of the Limitation Act 1961 in relation to the evidence.
e) The Learned Trial Judge dismissed the Counterclaim of the 1st and 2nd Defendants in the light of the evidence led and submissions made in support of the same.

RESPONDENTS' GROUNDS OF APPLICATION FOR VARIATION OF JUDGMENT

5. Their Grounds of Appeal and Grounds for the Application that the Decision of the Court below be varied, are as set out in both Notices are as follows:
   1) That the Learned Trial Judge erred in Law in failing at the very least to pronounce a statutory title in favour of the 2nd Defendant based on the relevant provisions of the Limitation Act,1961 even though there was abundant evidence showing that the 2nd Defendant had been in possession of the land through the 1st Defendant for a period of over 14 years before the action was brought by the Plaintiff.
   2) That the Learned Trial Judge erred in Law when he held that the Plaintiff was within his rights to institute the action despite the fact that the action was brought by the Plaintiff well over 14 years since he became aware that the land was occupied by the 1st Defendant contrary to the relevant provisions of the Limitation Act,1961.
   3) That the Learned Trial Judge erred in Law when he held that the period of occupation of the land by the 1st Defendant was not authorized by the 2nd Defendant even though there was evidence indicating the contrary.
   4) That the Judgment of the Learned Trial Judge as regards the 2nd Defendants' Defence and Counterclaim is against the weight of the evidence led in support of the same.

6. In the premises, they pray that this Court sets aside the Judgment of KAMANDA,JA dismissing their Counterclaim and that Judgment be entered for the 1st and 2nd Defendants.

FACTS OF THE CASE - PLAINTIFF'S CLAIM

7. By a generally indorsed writ of summons dated 25 April,2005, issued by Serry-Kamal & Co, the Plaintiff claimed against the Defendant Damages for Trespass, Recovery of Possession of land situate at UN Drive, Off Wilkinson Road, Freetown then and still occupied by the Defendants; An Injunction restraining the Defendants from entering or remaining on the land; Cancellation of Deed of Conveyance dated 12 October,1990 and duly registered as No. 1456/90 at page 53 in volume 443 of the Record Books of Conveyances kept in office of the Registrar-General, Freetown; and Damages for Nuisance.
8. The 1st and 2nd Defendants entered appearance to the writ of summons, through their Solicitors, Renner-Thomas & Co on 12 May,2005 and gave Notice of the same to Plaintiff's Solicitors the same day. 3RD Defendant did not enter appearance to the writ.
9. On 29 June,2005 the Plaintiff filed his Statement of Claim. He averred as follows: He bought the property in 1986, and his title to the same, dated 15 October,1986 was duly registered as No. 1550/86 at page 90 in volume 393 of the Record Books of Conveyances kept in the office of the Registrar-General. Attached to that Deed was survey plan LS2383/86 dated 10 October,1986. By a Deed of Conveyance dated 12 October,1990 and duly registered as No. 1456/90 at page 53 in volume 443 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown, the 3rd Defendant wrongfully purported to convey part of Plaintiff's property to 2nd Defendant. 1st Defendant and others had begun trespassing on Plaintiff's property. The Plaintiff therefore prayed for the several reliefs, adding three to the five stated in his general indorsement, to wit: Recovery of possession of that part of the Plaintiff's property occupied by the 1st Defendant - not all the Defendants as in the general indorsement; interest, but without stating why it was being prayed for; and any further or other relief.

FACTS OF THE CASE - CASE FOR 1ST AND 2ND DEFENDANTS

10. The 1st and 2nd Defendants filed a Defence and Counterclaim dated 6 July,2005. By Order of the Court dated 20 September,2005 the 1st and 2nd Defendants were granted Leave by KAMANDA,JA to amend their joint Defence and Counterclaim, and to file the same within 10 days of the date of that Order. The amended Defence and Counterclaim was filed on 21 September,2005. It went as follows: 2nd Defendant admitted the existence of the 1990 Deed, but denied that the property conveyed by that Deed, was wrongfully conveyed. 1st Defendant averred that her property was located away from Plaintiff's property. 1st Defendant averred in the alternative, that she had been in exclusive possession of that property for at least 14 years, and would thus rely on the provisions of the Limitation Act,1961. In the Counterclaim, 2nd Defendant averred that he brought that claim through his Attorney, the 1st Defendant, by virtue of a Power of Attorney dated 4 April,2005 and duly registered. He had become owner of the property at UN Drive by virtue of the Deed of Conveyance dated 12 October,1990, the cancellation of which, the Plaintiff sought in his claim. His property was delineated on survey plan LS 1985/90 dated 12 September,1990 and measured 0.0823 acre. It was the Plaintiff who had been trespassing on, and laying claim to his property. In particular, Plaintiff's acts of trespass had resulted in damage to his concrete wall fence, costing Le1.5million. He therefore sought a Declaration that he was the fee simple owner of the property at UN Drive; an Injunction; Damages for Trespass; Damages for Malicious Damage; Further or other relief and Costs.
11. On 30 March,2006 V V Thomas was appointed Solicitor for the Plaintiff, and filed two Notices to that effect. On 16 May,2006, he filed a Reply and Defence to Counterclaim on Plaintiff's behalf. Later, on 19 May,2006, he obtained an Order from KAMANDA,JA to file this pleading out of time.

PLAINTIFF'S REPLY TO DEFENDANTS' DEFENCE

12. In his Reply, he joined issue with the Defendants on their Defence. In his defence to counterclaim, he contended that the 12 October,1990 Deed could not have conferred title to the property at UN Drive, on the 2nd Defendant. He denied that 1st Defendant had been in exclusive possession of the Plaintiff's property at UN Drive for over 14 years, and averred

that it was only in 1997 – i.e. 7 years before the institution of the action that the Defendants entered a portion of Plaintiff's property. When this occurred in 1997, Plaintiff addressed a letter to the caretaker on Defendants' property as at the time, Plaintiff was unaware of the person laying claim to the land. In 2001, the Plaintiff was compelled to pull down a fence which had been constructed by Defendants.

COURT GIVES DIRECTIONS

13. On 12 June,2006 KAMANDA,JA gave Directions for the future conduct of the trial. Witness statements, registered instruments, and surveyors' reports were filed by the respective parties. Pursuant to an Order of KAMANDA,JA dated 29 June,2007, the 1st and 2nd Defendants were again given Leave to further amend their amended Defence and Counterclaim. This amended pleading was filed on 2 July,2007. The Plaintiff also filed an amended Reply and Defence to Counterclaim dated 3 July,2007 but filed on 5 July,2007. In his Reply, the Plaintiff averred that the 2nd Defendant had not been in exclusive possession of the land claimed by him for 14 years or for any period which would satisfy the requirements of the Limitation Act.

TRIAL COMMENCES – EVIDENCE FOR PLAINTIFF

14. On 20 October,2006 the trial commenced before KAMANDA,JA. The Plaintiff gave evidence on his own behalf as PW2, and called three witnesses: PW1 was the representative of the Administrator and Registrar-General's Office, Abdul Rahman Bangura, who tendered in evidence 4 Deeds of Conveyances; PW3 was the surveyor, now deceased, Shamun Hamid; and PW4, Sulaiman Mansaray, Plaintiff's Attorney. The sum total of the Plaintiff's case, as recorded is this: The Plaintiff, PW2 bought the land at UN Drive from Alhaji Amadu Wurie Jalloh in 1986. His title to the property is recorded in Deed of Conveyance dated 15 October,1986 and duly registered as No. 1550/86 at page 90 in volume 393 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. The area and dimensions of the land are delineated in survey plan LS2383/86 dated 10 October,1986. The area is 0.6897 acre. The property is bounded on the west, north and part of the east, by un-named private property. On the south-east axis, it is bounded

by a 20ft access road. On the south west axis, it is bounded by property of Dr Mohamed Kargbo. The access road, runs into another road which leads to Wilkinson Road. The survey plan was drawn by the late Mr Boston-Mammah a highly respected licensed surveyor, and signed on behalf of the Director of Surveys and Lands, by W O Hunter. For the avoidance of doubt, my description of the cardinal points are, as shown on page 10 of the Record, is based on the north being on the left of the page, south being on the right, east being towards the top, and west being towards the bottom.

15. The Plaintiff's vendor's predecessor-in-title was Lahai Kamara, who sold the land to Alhaji Jalloh in 1983, and executed a Deed of Conveyance in Alhaji Jalloh's favour, dated 31 August,1983 and duly registered as No. 1262/83 at page 116 in volume 354 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. At the time he bought the property, there was an access road leading from UN Drive, which went past it. The land was undeveloped when he bought it. He employed the 3rd Defendant as caretaker up unto September, 1989. Between 1986 and 1990 Plaintiff built temporary structures on the land, and had rented out the same to tenants. In 1997, he discovered that someone had trespassed on his property. His then Solicitor, Mr Alimamy Kamara wrote to one Michael Sesay, who is now deceased, and was as the evidence turned out, related to the 1st Defendant. He was at the time occupying an unfinished building on the land. In 2001, another letter was written on his behalf and addressed to one Abdulai Bah who gave evidence as DW2. He demolished a fence which had been constructed by 1st Defendant on his land. This resulted in criminal proceedings being brought against him in the Magistrate's Court.
16. The Plaintiff constructed a boundary wall around the north—east side of his property. After 1990, he learnt that 3rd Defendant had sold part of his land to 2nd Defendant. He eventually instituted action against the Defendants in 2005. This was after the wall-breaking incident in 2001.
17. It was suggested to the Plaintiff when he was being cross-examined by Mr Johnson, Counsel for the 1st and 2nd Defendants, that he had at one time agreed an exchange of landed properties with 1st Defendant, as a way of settling his claim to the land in dispute at the trial. He denied the suggestion. I have highlighted this suggestion and denial, as it bears

importance on whether 1st and 2nd Defendants could rightly plead Limitation as a bar to litigation. Whatever the import of the exchange, it goes to show that the 12 year period which entitles one to claim adverse possession was not unbroken.

LOCUS IN QUO - PROCEDURE

18. One feature which has drawn our attention, is the visit to the locus. At the end of PW2's cross-examination on 22 Januarry,2007 it was agreed that a locus in quo be held on Wednesday 31 January,2007. The minutes of the Learned Trial Judge at page 109 of the Record, show that it was eventually held on Wednesday 21 February,2007. The minutes also show that at the hearing on 26 March,2007, the Court Registrar, Sheka Kemoh Mansaray, was called as a witness of the Court, to give evidence as to what transpired at the locus. His notes of what transpired were admitted into evidence, and marked exhibit G. His notes, in our view constituted inadmissible hearsay, and/or a previous consistent statement which was in any event, also inadmissible as not being such as could be admitted in evidence to prove consistency or, to refute accusations of recent concoction or fabrication. Those notes were not read over to those present at the visit, nor were they signed or otherwise authenticated by any of them, and by the Presiding Judge. Exhibit G even refers to Mr Johnson cross-examining the Plaintiff. All evidence at a trial in English and Sierra Leone jurisprudence, has to be taken on oath, save where documentary evidence of a hearsay nature, could be admitted under the provisions of the Evidence (Documentary) Act, Chapter 26 of the Laws of Sierra Leone,1960. The procedure adopted by the Court, was with respect to the Learned Trial Judge, and Counsel who concurred in the same, palpably wrong. A locus in quo is part of the trial. What should happen is that witnesses who have testified or, will subsequently testify, make indications and sometimes, take measurements in the presence of parties and/or their lawyers and always in the presence of the trial Judge. A date is then fixed for these witnesses to come back to Court to testify on oath, as to what they did and said at the locus in quo. A Judge can only call a witness in extremely limited circumstances, this not being one of them. And just to show how unsafe such a procedure is, there is no record of the persons present at the locus in quo being asked to confirm

that what clerk had recorded, was true and correct. Further, none of the Defendants were present, though Mr Johnson was there, and none of the surveyors were also present. However, we are satisfied that this wrong procedure did not influence the trial Judge in his Judgment, nor did it have any impact on it, though he incorporated it in his judgment.

ISSUES IN DISPUTE

19. The most important pieces of evidence in our view were those of the surveyors. PW3, the late Shamun Hamid, was the Appellant's surveyor and Eric Forster was the 1st and 2nd ~~Appellant's~~ Respondent's surveyor. The case was about whether the land sold by 3rd Defendant, the Plaintiff's erstwhile caretaker, to the 2nd Respondent, had encroached on the land the Appellant had bought from Alhaji Wurie Jalloh in 1986; and whether, if this was so, the Plaintiff's claim was Statute-barred: whether 3rd Appellant was indeed, the rightful owner of that property: and whether the survey plan in 2nd ~~Appellant's~~ Respondent's deed of conveyance was in accord with that in the 3rd Defendant's deed of conveyance.

ARGUMENTS IN RESPECT OF LIMITATION PERIOD AND ADVERSE POSSESSION

20. We shall deal first, with the question of whether the Appellant's claim was statute-barred, and whether the Learned Trial Judge came to the right conclusion, when he said at page 161 of the Record: "3. *It is true that the period spent on the land by the 1st Defendant was not authorized by the alleged true owner, 2nd Defendant. The only document (Power of Attorney) from 2nd Defendant for 1st Defendant dated April 4th 2005 only empowered the latter to take charge of the said property at U N Drive.....and proceed in due form of Law against trespassers and to bring and defend any actions related to the land. There is no authorization for 1st Defendant to occupy the land on behalf of 2nd Defendant to qualify her to commence adverse possession. In any case the period of less than 3 years (that is, April 4th 2005 to present) is far too short to constitute the statutory period to stop the alleged owner/claimant (Plaintiff) from bringing an action to recover the land. In these circumstances, I overrule Mr Johnson and hold that the Plaintiff is within his right to institute this action.*" Was the Learned Trial Judge right in the conclusion he had

reached.? We shall therefore have to examine the Law on this particular issue, quite carefully, to enable us to decide whether he was right or not.

LIMITATION ACT,1961

21. Sub-Section 5(3) of the Limitation Act,1961 provides that: "*No action shall be brought by any other person to recover land after the expiration of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person.....*". Sub-Section 6(1) of the same Act states that: "*Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.*" Sub-Sections 11(1) & (2) state as follows: "*No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation it can run (hereafter in this section referred to as "adverse possession") and where under the foregoing provisions of this Act any right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land. (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to accrue unless and until the land is again taken into adverse possession.*"

22. The question which arises, is whether the Learned Trial Judge, calculated the limitation period in accordance with these provisions; and whether he was right in adjudging that the 1st Respondent's adverse possession of the land claimed by the Appellant could only have commenced on 4 April,2005 the date she was given the Power of Attorney by the 2nd Respondent; and that 2nd Respondent could not have been in adverse possession of the land as he was in the United States of America nearly all the time, and 1st Respondent's possession could not inure to his benefit, as she had no authorization to go into, or, to remain in possession of the land, before the date in April,2005.

LIMITATION PERIOD - THE AUTHORITIES

23. We think it would be a good idea to refer to the leading text on land law in Sierra Leone authored by Mr Johnson's one-time head of chambers and former Chief Justice, Hon Justice Renner-Thomas, LAND TENURE IN SIERRA LEONE (2010). At pages 127-128, this is what the Learned Author had to say: " *The first provision of importance is that which states that, where an owner of land is entitled to possession, time does not begin to run against him for the purposes of the Act unless he has been dispossessed or has discontinued his possession and adverse possession has been taken by some other person. What amounts to dispossession and discontinuance of possession as a basis for adverse possession was considered by BEOKU-BETTS,J in the case of PRATT v NICOL [1937-49] ALR SL 277 (not 377 as appears in the book) H.C. According to the Learned Judge "dispossession" suggests some active steps by the claimant to take possession from the owner or to drive him from possession. "Discontinuance" on the other hand, implies that the owner has abandoned his possession and some other person has taken over possession. However, as BEOKU-BETTS,J emphasised in PRATT v NICOL, it is not sufficient that the owner goes out of physical occupation of the land. For discontinuance to be effective the intention to abandon must be clear and 'the evidence must show that it was complete and that the defendant after such discontinuance obtained exclusive possession for the statutory period'. .....Adverse possession, as used in section 11(1) of the Act, does not bear a technical meaning but has been construed to mean simply possession inconsistent with the possession of the owner."*

24. In the case cited by Hon Justice Renner-Thomas, BEOKU-BETTS,J went on to say at page 281, LL22 et seq in dealing with the concept of discontinuance, "*....It is not sufficient for the owner to go out of the physical possession of the premises. There must be evidence of the acts of the defendant inconsistent with the possession of the owner. If the defendant's acts are consonant with his recognition of the continued possession of the owner, he or she could not claim to have exclusive possession though in fact, he or she occupied the premises.*"

FACTC FOUND BY LEARNED TRIAL JUDGE

25. The facts as found by the Learned Trial Judge at pages 154-155 of the Record were that the Appellant bought the property at UN Drive in 1986. Between 1986 and 1990, he built structures on the land. He employed 3rd Defendant as his caretaker between 1986 and 1989. He left for the United States of America. When he returned in 1997, 8 years before he commenced action, he found out that someone had encroached on his land. His Solicitor addressed a letter, exhibit E dated 14 February,1997 to the then occupant Michael Sesay, a brother to 1st Appellant, and who died in January,1999. That letter demanded that Mr Sesay, referred to therein as 'Mike' should demolish a fence he had constructed on Appellant's land within 7 days. There was no response to this letter, so another one dated 15 February,2001, exhibit F was addressed to the current occupant of the land, DW2, Abdulai Bah. It notified him of the trespass, and he was requested, in the words of the Solicitors, "*...to remove your house on our client's land within 7 days of the receipt of this letter.....*" As there was no response to this letter as well, the Appellant proceeded to demolish the concrete wall erected by 1st Respondent. On these facts, could it be said that the Appellant had been dispossessed of his land for an unbroken period of 14 years beginning in 1990 or 1991, as contended by Respondents' Counsel? Or, could it be said that he had discontinued possession? As late as 2001, 4 years before instituting action against the Respondents, the Appellant was forcefully asserting his right to the land including the portion on which 1st or 2nd Appellant had constructed a wall. The 1st Respondent during the course of her testimony in the Court below, at page 116 of the Record, agrees that the Appellant demolished the wall and that he told her that she had encroached on his property. This does not appear to us the conduct of a man who had been dispossessed of his property, or, one had discontinued possession.

WHETHER 2ND RESPONDENT IN POSSESSION THROUGH 1ST RESPONDENT

26. It is true, as argued with much force by Mr Johnson, that the Learned Trial Judge did hold that possession by the 1st Respondent could not constitute possession by the 2nd Respondent, and that therefore, 1st Respondent's possession could only be deemed to commence when she received a Power of Attorney from 2nd Appellant. His finding, we believe,

was based on the divergence between the Amended Defence and Counterclaim filed on behalf of the 1st and 2nd Respondents, and the evidence given on oath by the 1st Respondent. 2nd Respondent's Defence and Counterclaim at the trial was based on his alleged ownership of the property at UN Drive by virtue of the Deed of Conveyance dated 12 October,1990 and duly registered, and not on 1st Respondent's supposed long occupation or possession of the property. But at the trial Counsel for 2nd Respondent appeared to be canvassing the position that he was in possession of the property through her. On her own admission as well, 1st Respondent only went into possession in 2004 – see page 114 of the Record. But at page 120, while being cross-examined by Appellant's Counsel, she said: "*I started occupation on Plaintiff's land in 1996 – at that time there was a wall separating plaintiff's and defendant's land.*" The Power of Attorney granted to her by the 2nd Respondent is dated 4 April,2005 – page 201 of the Record. It empowers her take over from the 2nd Respondent's Aunt, Elizabeth. Elizabeth did not testify, nor was there any evidence that she had ever been in possession of the land. At page 117 of the Record, 1st Respondent is also heard to say that she first heard of the allegation of encroachment when her late brother, Mike, telephoned her whilst she was in the States in 1998. She said also, as recorded on the same page: "*I have no idea that the plaintiff has been objecting to construction of my property from 1997 up to 2001.*" The only reasonable inference to draw here, is that it was only when she started construction that the Plaintiff could have become aware of the trespass to his property.

27. Mr Johnson has argued with much force, at page 3 of his synopsis, that "*...the 2nd Respondent proved that he, through his lawful agents have been in possession of the property in question from October,1990 to date.*" He goes on to refer to HALSBURY'S LAWS OF ENGLAND 3rd Edition Volume 24 paragraph 487 at page 254 under the rubric 'possession by another He submitted that "'*an owner who actually occupies land is in possession of it, but if he does not actually occupy it but, puts someone else on it to occupy it for him, then the owner is equally in possession.*" Ground 3 of his Grounds of Appeal, states that: "*The Learned Trial Judge erred in law and in fact when he held that period of occupation of the land by the 1st Defendant was not authorized by the 2nd Defendant even though there*

was evidence indicating the contrary." Where was this evidence? Mr Johnson did not say, because there was none. Citing an authority without the required evidence to support it, does not lead anywhere. The only evidence that 1st Respondent had been authorised to occupy the property by 2nd Respondent, came from 1st Respondent herself. This is mere self-corroboration. There is no evidence coming from 2nd Respondent that he did so, other than the vague Power of Attorney he granted to 1st Respondent on 4 April,2005. There is no evidence that 2nd Respondent authorised the late Michael Sesay and PW4, to occupy the property he had bought. It was 1st Respondent who it appears, allowed each of them to occupy the property, and not 2nd Respondent. This consideration appears to be another dent in the 14 year possession theory canvassed by Mr Johnson on behalf of both Respondents.

WHEN DID TRESPASS COMMENCE?

28. There was no suggestion throughout the entire case, that there had been any act of trespass prior to 1997 of which the Appellant was aware, or, should have been aware of. The Learned Trial Judge had already accepted that as recently as 2001, the Appellant had exercised his right of ownership by demolishing the wall erected by 1st Respondent, thereby effectively regaining possession of that portion of his land which had been wrongfully occupied by the 1st Respondent. The Appellant did not acquiesce in the Respondents' trespass and wrongful occupation of his property. It seems to us that Mr Johnson has attached undue weight to *the year* 2nd Respondent bought the property. The emphasis in the legislation is not when the party claiming adverse possession bought the property, but rather, when the right of action accrued. The Judge found as a fact that as recently as 2001 the Appellant was enforcing his right to the property. It was when this strategy failed, that action was instituted in 2005. In the premises, time could not have begun to run against the Appellant in 1990, as has been argued by Mr Johnson. And, contrary to the argument canvassed by him on page 5 of his synopsis, the 1st Respondent had not been in "*undisturbed possession*" of the property for a twelve year period prior to the commencement of action, because of the action taken by the Appellant in 1997 and 2001. It was not as if he had acted surreptitiously or, in the manner explained by LORD

HALSBURY in the case of MARSHALL v TAYLOR [1895] 1 Ch. 641 - creeping over the hedge or climbing over the wall. The Learned Trial Judge did not find that the Appellant had to use a stratagem in order to demolish the wall.

29. As was pointed out by TEJAN,J in BAXTER v WILSON [1970-71] ALR SL 351 at p 359 H.C.: " *The general rule is that time begins to run against a Plaintiff only from the date on which the right of action accrued to him or to the person through whom he claims. But time does not begin to run from the specified dates unless there is some person in adverse possession of the land. It does not run merely because the land is vacant, and there must be both absence of possession by the plaintiff and actual possession by the defendant.*"

WHEN TME BEGINS TO RUN

30. Further, in the case cited above, MARSHALL v TAYLOR, A L SMITH, L.J. said at page 651: "....*Now what is the Law applicable to such a state of facts as this? It is this: there must be actual possession by one and a discontinuance of possession by the other; or, in other words, in this case it must be proved by the Defendant, who is setting up the Statute of Limitations, that there has been an actual possession of the land in dispute by him for the statutory period, and during that period a discontinuance of possession by the Plaintiff.*" The Learned Trial Judge found on the facts, that the Appellant had not been dispossessed of his land for a continuous and unbroken period exceeding 12 years. The emphasis here, is not that Appellant had not been dispossessed at some point in time - this is why action was brought. The point is, that he was dispossessed of his property, on the facts of the case as found by the Learned Trial Judge, for an unbroken period of 12 years plus prior to the commencement of the action. We concur with the Learned Trial Judge in his finding in this respect, and therefore will therefore refuse the Appellants' Application that we vary the same.

EVIDENCE OF THE SURVEYORS

31. The next issue, is the manner in which the Learned Trial Judge treated the evidence of, and the Reports prepared by the surveyors. We have dealt with the Locus in Quo, in paragraph 17 above, and we have noted

that neither of the surveyor-witnesses, was present. At page 156 of the Record, the Learned Trial Judge, comments on this procedure: "*On Wednesday 21st February,2007 the Court visited the locus....In summary, various indications regarding access roads were made by the Plaintiff which was disputed under cross-examination. In particular, the Plaintiff and defence counsel disagreed whether an access road to Plaintiff's property was to the North west (as claimed by the Plaintiff, interpreting Exhibit B1), or, to the North-East (as claimed by Defence Counsel interpreting the same exhibit. In consequence, it was agreed by Counsel on both sides to produce expert witnesses to determine whether the access road on the Plan in exhibit B1 is on the North-West or North-East of Plaintiff's property. In answer to a question from the Court, regarding the extent of Plaintiff's claim, he said he was claiming the entire land including where Defendants' house is situated* " This passage illustrates how futile the exercise was, done in the absence of the very persons who could have assisted the Court.

LEARNED TRIAL JUDGE'S COMMENTS ON EVIDENCE OF SURVEYORS

32. At page 159 , the Learned Trial Judge makes this comment:" *With regards to the evidence of two experts (licensed surveyors) who testified on behalf of the parties, I shall rely on their reports and their testimonies. Plaintiff's surveyor produced Exhibit H1, H2 and H3. Defendants' surveyor produced exhibit K.*" His assessment of the evidence of both surveyors, is set out at pages 162-165 of the Record. Starting at the bottom of page 162 on to page 164, he states:"*.....Of special note in the witness's testimony (i.e. PW3 - Shamun Hamid), is this:"therefore LS1985/90 (Fouad Sheriff's property) was wrongly located because it was sitting on the road adjoining plaintiff's property, that is LS2383/86" Another of the witness's findings was that "LS2850/89 (property of Abdul Bangura) and LS1985/90 (property of 2nd Defendant) are separate plots of land which bear no relationship with each other. At another point in his report titled 'work done' the witness wrote in describing his survey of LS2383/86 using two government control beacons located at Wilkinson Road, wrote: 'A plot of this survey shows clearly that the road on the North-West boundary is the only one on the ground on that side and that an attempt has been made to interpose LS1985/90 (2nd Defendants'*

property) between that North-West boundary of LS2383/86 and the road Under cross-examination, the witness said 'I see only one access road on B1 (that is LS2383/86). That access road is leading to plaintiff's property and going past it. The access road is on the North-East part of the property'. This witness's testimony is in clear conflict with his report cited above and that conflict remains unresolved. Mr Eric Christian Arthur Forster, surveyor and civil engineer testified on behalf of the defence. He tendered a report marked K which in total says little regarding the encroachment which this matter is about. Under cross-examination, he said that the grid co-ordinates C1 and D1 (That is Bagura's property sold to 2nd Defendant) are completely different. They do not even have a common boundary. The plot of land shown on LS2850/89 in exhibit C1 was not the plot of land sold in LS1985/90 in exhibit D1. Both surveyors are agreed in this respect. What I have failed to see is evidence from either of them that there is indeed an encroachment by the defendants on plaintiff's land. Mr Forster in his report has made measurements on the ground showing a difference in measurements on the plans of both the plaintiff and the defendant. He does not however indicate the import of these differences. Part of his findings are that both LS1985/90 and LS2383/86 have a common boundary line. The solution he suggests from his findings that 'adjustments could be made on site for a reasonable solution on the common side with both parties present on the site' is meaningless, and is of no relevance to the issue before the court."

THIS COURT'S ASSESSMENT OF EVIDENCE OF SURVEYORS

33. It seems to us that the Learned Trial Judge had at this stage found that the property of the 2nd Respondent was wrongly located. That this was so, is clearly depicted on the composite plan drawn by PW3, and is at page 199 of the Record. 3rd Respondent's (2nd Respondent's predecessor-in-title) property, is shown far to the left of the Appellant's property. Therefore, if 2nd Respondent had bought property from him, that is where his property should have been located, and not where it was found to be on the same page 199. This is why, it appears, the Learned Trial Judge dismissed the 1st and 2nd Respondents' Counterclaim: They had not proved on a balance of probabilities that 2nd Respondent was entitled to a

Declaration of title to that property. As PW3 stated in his Report at page 197 of the Record, the presence of the beacons BM143/86 and BM144/86 on LS1985/90 2ND Respondent's survey plan, which beacons are clearly located on the Appellant's survey plan at page 180 of the Record, was evidence that 2nd Respondent's land had been wrongly located.

34. Where we think the Learned Trial Judge went wrong, was in his evaluation of the composite plan drawn by PW3 and which is shown on page 200 of the Record. That plan shows quite clearly that 2nd Appellant's structures have been built right inside the Appellant's property. It depicts '*existing building on Fouad's property*', *several 'tin shacks' and a 'building under construction'*. This is why he said in paragraph 2 of his Report, to be found at page 197 of the Record: " *I undertook a detailed physical survey of LS2383/86 as indicated on the ground using two government control beacons located at Wilkinson Road. A plot of this survey shows clearly that the road on the north-western boundary is the only one on the ground on that side and that an attempt has been made to interpose LS1985/90 between that north-western boundary of LS2383/86 and the road.*" This is why he uses the verb, "*attempts*". The reality is depicted at page 200: 2nd Respondent's property is actually within the boundaries of the Appellant's property, and not at its north-western edge as it would seem to be on page 199. We think therefore that the Learned Trial Judge was wrong, to conclude as he did at page 164 of the Record, that: "*Mr Hamid's conclusion is to the effect that the Defendant's property is wedged in between the plaintiff's boundary fence and the access road. The land outside the plaintiff's fence cannot be said to be his property. The access road also cannot be said to be the plaintiff's property on account of which he can sue, there being no evidence that the access road was created out of the plaintiff's land.*" What he had done, was to treat pages 199 and 200 of the Record as separate documents, rather than as one complementing the other, and had gone on to conclude that so long as 2nd Respondent's land was shown to appear partly on an access road at page 199, it meant, it was outside Appellant's property. Examining the composite plan at page 200 of the Record, it would immediately be seen that there were not two access roads, on the left side of the sketch, but one, and that all of the buildings and structures located in

that plan fall within the area depicted as the Appellant's property at page 199. The appearance of beacon numbered BM143/86 at the bottom left of the respective composite plans on pages 199 and 200 is significant. It appears in much the same position as in the Appellant's survey plan LS2383/86 at page 180 of the Record. It is perhaps, for this reason, that Mr Hamid uses the caveat, in describing one of the access roads on page 199: " access road as per LS1985".

35. We have noted also, when dealing with this particular aspect of the case, i.e. whether there was one, or whether there were two access roads, that neither Counsel, nor the Court appreciated that the landscape could not remain the same over a near twenty year period. When the Appellant bought the land in 1986, clearly, there was only one access road - on the right side of page 180. The rest of his property was bounded by private property on two sides, and by property of Dr Mohamed Kargbo, on the third side. Time and effort, most of it unprofitable in our view, was spent by Counsel for the Respondents, arguing as to whether the access road should be north-east or north-west of Appellant's land. It seems to us that because it was now apparent, that on the ground, whether legally right or not, there were now two access roads, it mattered whether Appellant was right or wrong in describing the access road bordering his property in his survey plan as being in the north-west or the north-east. The point is that, in 2006 when PW3, Mr Hamid carried out his survey, there were two access roads on the property. Part of what would appear to be the area nearest the existing access road at the time Appellant bought his property, i.e. towards the top right hand corner of page 200, has been taken up by what Mr Hamid describes as 'existing building on Fouad's property.' There now appears to be an access road on the left side of the property as depicted on page 180, where once was an area described as private property.

36. When we turn to the import of DW3's Report at pages 203 - 206 of the Record, we find that it was negligible, as far as the case for the Respondents went. It did not really say anything, though he admitted at page 203 of the Record, that: "*Notably the Beacons pertaining to these properties under construction were not in place and also the width of the respective access roads found differ from those shown on the respective plans. Differences were encountered with the measurements of "AS*

FOUND" and "AS SHOWN" on the respective plans." Mr Forster's evidence and Report, respectively, certainly did not support the Respondents' contentions, and it is not therefore surprising that they did not find favour with the Court below, and that the Respondents' Counterclaim was dismissed.

LAW ON CLAIM FOR DECLARATION OF TITLE

37. The Law as has been rightly set out in SEYMOUR-WILSON v MUSA ABESS Sup Court App 5/79, SORIE TARAWALLI v SORIE KOROMA Sup Ct Civ App 7/2004 is quite clear. In a suit for Declaration of Title, the party seeking the Declaration must rely on the strength of his title rather than on the weakness of his opponent's title. In the SEYMOUR-WILSON case, LIVESEY LUKE, C.J. cited with approval the words of WEBBER.CJ in KODILINYE v ODU [1935] 7 WACA 3: " *The onus lies on the plaintiff to satisfy the court he is entitled , on the evidence brought by him, to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration.*" The 2nd Appellant sought a Declaration to this effect, but failed to satisfy the Court in this respect. We think the Learned Trial Judge was quite right in dismissing the Defendants' Defence and Counterclaim.

LEARNED TRIAL JUDGE'S REASONS FOR DISMISSING APPELLANT'S CASE

38. We now turn our attention to the Judge's reasons for dismissing the Appellant's case. At page 162, the Learned Trial Judge had this to say: "*I do not think it relevant in this case to evaluate the strength of the separate titles of the plaintiff and the defendants. Suffice it to say that both parties derive title from similar roots, a Statutory Declaration. I cannot therefore cast doubt on one title and accept the other."* Of importance at this point in time, is the failure of the Learned Trial Judge to appreciate that the Appellant did not seek a Declaration of Title from the Court. He was seeking Damages for Trespass and Recovery of

Possession of the land the subject matter of the trespass. Later, at page 163, he said, when dealing with the evidence of DW3, Mr Forster , "*....Under cross-examination he said that the grid co-ordinates C1 and D1 (That is Bangura's property sold to 2nd Defendant) are completely different. They do not even have a common boundary. The plot of land shown on LS2850/89 (3rd Defendant's survey plan in his Statutory Declaration) in exhibit C1 was not the plot of land sold in LS1985/90 in exhibit D1. Both surveyors are agreed in this respect. What I have failed to see is evidence from either of them that there indeed is an encroachment by the defendants on the plaintiff's land.*" In our view, this assessment was sufficient to ground a decision to dismiss the Respondents' Counterclaim. The Respondents could not get a Declaration of title to land which they had not proved to be theirs. For the reasons we have stated above, the same assessment was wrong when it came to the case for the Appellant. Page 200 of the Record as we have stated above, shows clearly that there had been an encroachment into the Appellant's property by the 2nd Respondent.

CLAIM FOR DAMAGES FOR TRESPASS

39. In a claim for Damages for Trespass, the burden on the party claiming the same is lighter than that on a party claiming a Declaration of title. The difference was admirably put by LIVESEY LUKE,C.J. in the SEYMOUR-WILSON case at page 82 of his cyclostyled judgment: "*In a case of trespass, what the plaintiff has to prove is a better right of possession than the defendant. One of the ways that he may do this is to prove that he has a better title to the land than the defendant. But "better" title in the context of an action for trespass is not necessarily a "valid" title. In a case of trespass the court is concerned only with the relative strength of the titles or possession proved by the rival claimants. The party who proves a better title or a better right to possession, succeeds, even though there may be another person, not a party, who has a better title than him.....*" At page 83 the Learned Chief Justice went on to say: "*..In an action for trespass the important consideration is possession. The important issue is who has proved a better right to possession. A mere possession is sufficient to maintain trespass against any one who cannot show a better title.*"

40. Clearly, the evidence at the trial, which was accepted by the Learned Trial Judge, shows that the Appellant had a better right to possession of the land in dispute. The Learned Trial Judge had accepted and adjudged that the land claimed by the 3rd Defendant in exhibit C1, pages 183-186 of the Record, was separate and distinct from that claimed by the 1st and 2nd Respondents as that which they bought from him and exhibited as D1 at pages 187-190 of the Record. In other words, 1st and 2nd Respondents were not entitled to the land located at the position indicated in exhibit H2 and H3 respectively. Once he had reached this conclusion, he should have gone to declare for the Appellant on the basis that he had established a better right to possession of the land at UN Drive than the Respondents. The Appellant's appeal therefore ought to succeed in this respect.

DUTY OF AN APPELLATE COURT

41. It remains for us to decide what course of action this Court should take. Ordinarily, an appellate tribunal would not interfere with the findings of fact made by the trial judge. But it has to do so where it has come to the conclusion that wrong inferences were drawn from proven facts. We are of the opinion that there was sufficient evidence before the Learned Trial Judge in this case, for him to come to a conclusion that the Appellant should succeed on his claim. At the end, he seemed not to be sure what to do. At the bottom of page 164 to the top of page 165 of the Record, he says: " *There has been adduced in this case evidence of the existence of an access road to the north west or the north east of the plaintiff's property. As I see it, this issue remained in contention between the plaintiff and the defendants to the end of the case. Neither the plans in the exhibits, nor the reports of the surveyors, or the testimonies in court, or the visit by the court to the scene provided concrete evidence to help the court adjudge the mater one way or the other. The report of the locus in quo noted:, "there is no conclusion as yet because the court will have to visit a second locus involving expert witnesses to determine the access road in the plan in exhibit B1.*" This did not take place. Then he went to dismiss both the Appellant's claim, and the Respondents' Counterclaim.

42. We do not believe that a second locus in quo was necessary. The one which was held was unprofitable because it was held in the absence of experts. But we believe that there was ample evidence provided by Mr Hamid, PW3 which should have assisted the Court in deciding the issues before it. And this we intend to do in accordance with the powers conferred on this Court by Rule 32 of the Court of Appeal Rules,1985.

43. The cases tell us that this Court is in as good a position, in certain circumstances, as the Court of first instance, to decide the proper inferences to be drawn from proven facts. In the SEYMOUR WILSON case, LIVESEY LUKE, C.J., cited with approval first, the case of WATT or THOMAS v THOMAS [1947] AC 484, where, in dealing with the attitude this court should adopt, the head-note states: "*.... The appellate Court is, however free to reverse his (i.e. the trial judge's) conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses, or, has failed to appreciate the weight and bearing of circumstances admitted or proved*"; And then the case of BENMAX v AUSTIN MOTOR CO. [1955]1 All ER 326 H.L. where LORD REID said at page 329: "But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

44. We shall also refer to the Judgment of this Court in Civ App 23/04 - ALFRED OLU-WILLIAMS v MOUALLEM delivered on 10 February,2010: "*Mr Jenkins-Johnston has cited to us the cases of WATT v THOMAS [1947] AC 484 and BENMAX v AUSTIN MOTOR CO LTD [1955] 1 All ER 326 per LORD REID at page 329. We agree and accept the propositions of law stated in those decisions, but they do not help the Respondent's case. Where a trial Judge has made findings of doubtful validity - WHITE CROSS INSURANCE v TAYLOR [1968-69] ALR SL per MARCUS-JONES,JA at page 182 LL33-37, this Court will interfere with those findings, and per DOVE-EDWIN,JA at page 179 LL17-19.* " *This appeal is by way of rehearing and I am in the same position as the Learned Acting*

Chief Justice, who saw the witnesses, to come to my own conclusions"; and per DOVE-EDWIN,JA at page 180 LL35-40 citing with approval HENN-COLLINS,MR in IN RE MOULTON (1906) 94 L T 454 at 458: "*We are aware of the great weight properly attributable to the opinion of the Judge who has seen and heard the witnesses; but an appeal is a rehearing, and we cannot avoid the responsibility of forming a judgment on the matter for ourselves.*" Further, in JOINT VENTURE CONSTRUCTION COMPANY v CONTEH [1970-71] ALR SL 145 per TAMBIAH,JA at 149 Line 38 to page 50 Line 22, "*Although this Court is reluctant to interfere with the findings of fact of a trial Judge, this case comes within the principles under which an appellate Court can interfere with the findings of a trial Judge.....it is open to an appellate court to find that the view of a witness was ill-founded...Where the point in dispute has to be decided by the proper inferences to be drawn from the proved facts, an appeal court is in as good a position to evaluate the evidence as the trial Judge, and may form its own independent opinion.....the Learned judge, having misread the evidence, failed to evaluate the whole of the evidence led and, what is more, came to the wrong inferences on the proved facts, and, with respect, gravely misdirected himself in the law"* the appeal would be allowed. We think the LTJ in this case not only misread and failed to properly evaluate the evidence, but also "*came to the wrong inferences on the proved facts,*" and thereby gravely misdirected himself in law. In such circumstance, we have no alternatively but to reverse the Judgment." We hold the same views in this case.

COSTS AWARDED IN THE COURT BELOW

45. We shall close with the issue of Costs. Ground 4 of the Appellant's Grounds of Appeal, is a complaint about the Learned Trial Judge's decision on this point. He dismissed the Plaintiff's claim with Costs to the Defendants, generally. This would mean that the 3rd Defendant, for instance, who took no part in the proceedings in the Court below, would be entitled to some part of the Costs. On the other hand, the Learned Trial Judge dismissed the 1st and 2nd Defendants' Counterclaim, but Ordered that each party bear its own Costs. It is our view that his decisions in both cases, are irreconcilable. Costs should generally follow the event. The principles relating to the award of Costs after a full trial, are amply

set out in Order 57 Rule 1 and Rule 5. It is clear that much is left to the discretion of the trial Judge. Mr Johnson has cited a welter of authorities in order to convince this Court that the Learned Trial Judge had acted on correct legal principles in arriving at his decision on the award of Costs. We do not think the Learned Trial Judge was right in refusing Costs to the Appellant, as technically, he had won his case as a defendant to the Respondents' Counterclaim. Ground 4 of the Appellant's appeal therefore succeeds as well.

ORDERS THIS COURT SHOULD MAKE

46. We now come to the Orders we should make. A case for Trespass was made out by the Appellant, but no evidence was led by the Appellant to substantiate the claim for Damages. It was also averred by the Appellant in his Statement of Claim, at page 30 of the Record, that the 1st Appellant had demolished his concrete fence. The averment was not substantiated at the trial. No clear guidance was given by LIVESEY LUKE, C.J. in the SEYMOUR-WILSON case as regards this head of Damages. The Appellant is therefore, only entitled to nominal Damages.

47. As regards the claim for Cancellation of the 2nd Respondent's Deed of Conveyance dated 12 October,1990 and duly registered, our view is that the Appellant succeeded in proving at the trial that the Respondents had trespassed on his property, and that their property may be located elsewhere as opined by the surveyor-witnesses. We have not made any Declaration in favour of the Appellant as regards the validity of the 2nd Respondent's registered instrument. Our decision goes to the survey plan in the instrument, and not to the instrument itself. We will not therefore make an Order for Cancellation of that Instrument.

48. He is entitled to recovery of possession of that part or portion of property delineated in survey plan LS2388/86 and on which, the Respondents have been found to be trespassing. As to the claim for Damages for Nuisance and Damages for Malicious Damage, no evidence was led under these heads On the other hand, as Trespass has been proved, the Appellant's possession ought to be protected by the grant of an Injunction. Costs should follow the event.

ORDERS

49. We therefore Order as follows:

i. The Appellant's appeal is allowed. The Judgment dated 10 March,2008 is hereby set aside. The Order that the parties to the Counterclaim bear their own Costs, is set aside.

ii. The 1st and 2nd Respondents Application for a Variation of the Judgment dated 10 March,2008 is dismissed with Costs.

iii. This Honourable Court Grants an Injunction to the Appellant, Restraining the Respondents and their servants and/or agents or howsoever otherwise from Trespassing on the property owned by the Appellant, situate, lying and being Off UN Drive, Off Wilkinson Road, Freetown the same whereof is delineated in survey plan LS2383/86 dated 10 October,1986.

iv. The Appellant is entitled to the immediate recovery of possession of the property described and delineated in the said survey plan, LS2383/86 dated 10 October,1986.

v. The Appellant is awarded Le2,500,000 as General Damages

vi. The Appellant shall have the Costs of this Appeal, and of the Court below.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL